

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of a petition of appeal in
terms of section 331 (1) of the Code of
Criminal Procedure Act No 15 of 1979
Democratic Socialist Republic of Sri
Lanka.

High Court (Gampaha)

Case No: 26/02

C.A. Case No: 300/12

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant

Vs.

1. Nishshanka Arachchige Neil Priyantha
121, Warapalana, Uduthuththiripitiya.

2. Nishshanka Arachchige Abraham
Singho
121, Warapalana, Uduthuththiripitiya.

AND

1. Nishshanka Arachchige Neil Priyantha
121, Warapalana, Uduthuththiripitiya.

1st Accused Appellant

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant Respondent

BEFORE

: **H.N.J. PERERA, J**
P.W.D.C. JAYATHILAKE, J

COUNSEL

: Weerasena Ranahewa with Sureka
Wijendra for the Accused
Appellant.
Dileepa Pieris SSC for the
Respondent.

ARGUED ON

: 03.10.2014

DECIDED ON

: 22.01.2015

P.W.D.C. Jayathilake, J

Kalyani was a widow, but she was living together with Nihal Sarath Kumara. Even though they lived in Sarath Kumara's parental house, his father, mother, brother and sisters all who lived in that house were against the said relationship. This couple was occupying the verandaroom of the house. They had lived like this for six months by 06.04.1997. Kalyani had problems right through out with Sarath Kumara's family members. When Sarath Kumara returned home after work on the said day, he was told by both his mother and Kalyani that there was a quarrel between them over a missing blouse. As there was no settlement, Sarath Kumara and Kalyani got ready to complain to the police and also informed the younger brother about this. After hearing that they were getting ready to complain to the police, the younger brother hacked Sarath Kumara with a knife while the father assaulted with a club. Sarath Kumara had fallen in the compound. Then he had heard Kalyani screaming. When Sarath Kumara was in hospital, he had come to know that Kalyani had died as a result of being assaulted. He had not participated in her funeral.

Nishshanka Arachchige Neil Priyantha and Nishshanka Arachchige Abraham Singho were indicted under Sec. 317 of the Penal Code read with Sec. 32 for committing grievous hurt on Nihal Sarath Kumara. The 1st Accused was

indicted in the same indictment under Sec.296 of the Penal Code for committing the murder of Kusuma Kalyani.

While the trial was underway, the 2nd Accused had died and after trial the 1st Accused had been convicted for the 1st and 2nd count, he was convicted after amending the Sec. 296 as 297. He has been sentenced for 5 years' imprisonment with a fine of Rs: 10,000/= for the 1st count and 5 years imprisonment with a fine of Rs: 7500/= for the 2nd count. A default sentence of 7 months' rigorous imprisonment has been ordered in default of the payment of fine. Finally it has been ordered that all these sentences be served concurrently. Being dissatisfied with the said conviction and the sentence the Accused Appellant has preferred this appeal.

If this Court makes a comment on the sentence passed by the trial judge, it has to be noted that when imposing the jail term, the trial judge has simply mentioned the term, "imprisonment", whereas when passing the default sentence, the term used is "rigorous imprisonment". Usually, we find the other way about, that is, rigorous imprisonment for the jail term and "simple imprisonment" for the default sentence. The other point is that the trial judge has directed that all sentences to be served concurrently, not only two jail terms, but also the default sentence which is not usually done. Accordingly,

there is no effect in imposing fines and passing default sentences over those fines.

Still another shortcoming is that court has not passed default sentences for two fines separately. As a result, where the offender pays one of the two fines, there is no certainty about how it affects the default sentence. Therefore, when court imposes two or more fines for separate charges a default sentence should be passed for each and every fine separately. Where there is only one default sentence for more than one fine the abolishment of default sentence takes place by the payment of any of the fines. The principle behind this situation is that the subject should not be suffered for the mistake made by court.

The learned counsel for the Accused Appellant addressed the court over the misdirection of the trial judge on the evidence led at the trial. The only eyewitness is Sarath Kumara who had suffered grievous injuries in the incident. He has stated that both accused, namely the brother and the father caused injuries to him with a knife and a club. The evidence available regarding the attack on Kalyani is only her screaming heard by Sarath Kumara. According to the medical evidence the fatal injuries to Kalyani have been caused with a club. It has been revealed that the club was in the hands of the 2nd Accused. It is not clear that why only the 1st Accused has been accused of murdering Kalyani that

is the 2nd count when the 1st charge has been brought against both accused for causing grievous hurt to Sarath Kumara acting in common intention. Even though the learned trial judge has discussed the motive for killing Kalyani she has not pointed out how the court attributes the culpability of murdering Kalyani to the 1st Accused.

The learned Senior State Counsel who appeared for the Attorney General submitted that there is no defence at all taken up by the Accused Appellant at the trial. He made court focus its attention on the dock statement of the Accused Appellant where he has stated that he did not assault Kalyani nor did he kill her, and making further statements admitting the fact that he hacked his brother.

As per the above facts, this court is of the view that the learned trial judge has convicted the Accused Appellant for the 2nd count without studying the evidence properly. Therefore, it is the opinion of this court that the conviction for the 2nd count cannot stand. We, therefore, set aside the conviction of the Accused Appellant for the 2nd count and acquit him for the same. But we see no reason to interfere with findings of the learned trial judge for the conviction of the Accused Appellant for the 1st count. Even though this court is not satisfied with the sentence passed by the learned trial judge, we do not intend to intervene for enhancement. Therefore, the sentence passed by the trial

judge is formalised as follows. The Accused Appellant is sentenced to 5 years' rigorous imprisonment with a fine of Rs: 10000/= carrying a default sentence of 7 months simple imprisonment.

Appeal allowed for the 2nd count of the indictment and appeal dismissed in regard to the 1st count. And the sentence is formalised as mentioned above.

The High Court Judge of Gampaha is directed to issue a fresh committal according to the above formalised sentence.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA J

I agree

JUDGE OF THE COURT OF APPEAL